

DOCKET FILE COPY ORIGINAL

Procedures for Adjudicating Program Access Complaints

RM Docket No. 909

RECEIVED

JUL 17 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

No. of Copies rec'd
List ABCDE

filing where discovery has been elected; and third, impose economic penalties in the form of forfeitures and/or the award of monetary damages for Section 548 violations.

3. Viacom did not file in the initial round of comments on the Petition because, as a non-vertically integrated satellite cable programming vendor to whom 47 USC §548 does not apply, Viacom has no direct interest in the procedural enforcement mechanisms adopted by the Commission with respect to this matter.

4. However, DIRECTV, Inc. ("DIRECTV") in its comments expressed support for a proceeding, should the Commission elect to commence one, to "fine tune" the program access rules so as to encompass cable programming delivered terrestrially and to examine, as well, whether and under what circumstances the rules should be extended to cover non-vertically integrated programmers.³ Although not stated explicitly, DIRECTV's suggestions imply - and surely must be read to suggest - that the Commission commence an inquiry for purposes of making recommendations to Congress; without a clear statutory mandate, which is now lacking, the Commission lacks the legal authority to extend the program access rules either to terrestrially delivered transmissions or to entities other than (i) vertically integrated cable operators, or (ii) common carriers engaging in the delivery of video services directly to subscribers.

5. DIRECTV's proposals have previously been presented to the Commission by several entities whose business interests are aligned with those of DIRECTV.⁴ The Commission has at least twice previously found no reason to recommend extension of the program access rules in the manner suggested.⁵ In its instant filing, DIRECTV offers no evidence of the need for its proffered extension of the rules other than to recite the Commission's own precautionary

³See Comments of DIRECTV in RM Docket No. 9097 at pp. 3-4.

⁴See e.g. comments of the Wireless Cable Association International, Inc. at 20-23 in CS Docket No. 96-133, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming ("Third Competition Report"); comments of Ameritech New Media, Inc., at 9-10 in the Third Competition Report; comments of SBC Communications Inc. at 6 in the Third Competition Report.

⁵ See Third Competition Report, Third Annual Report (rel. Jan. 2, 1997) at Paragraph 153-157; In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, CS Docket No. 95-61 (rel. Dec. 11, 1995).

admonition concerning possible future, but as yet inchoate, developments with respect to delivery of programming by terrestrial means in lieu of satellite if motivated for purposes of evading the access requirements. With respect to extending the rule to encompass non-vertically integrated programmers, there is no justification or evidence of behavior (either empirically, anecdotally or otherwise) which would justify an expenditure of the Commission's resources to investigate whether such a recommendation to Congress is warranted. As Viacom stated in a prior filing on this same matter:

Rather than relying on arm's length negotiations, commentators arguing extension of the program access rules seek to obtain a regulatory sword to be used against non-vertically integrated programmers. In effect, these parties urge the Commission to find that the proper way to deal with the market power they believe large cable operators exert over programmers is to extend the benefit of that market power to all distributors. The Commission should reject these overt attempts to "punish the victim," rather than the alleged perpetrators.⁶

6. As Viacom has also previously stated⁷, extension of the program access rules to non-vertically programmers would not promote competition. Rather, it would impede the development of new and established program services by restricting the flow of capital to these services. More concretely, but no less importantly, it is without question that the program access rules adopted by Congress in 1992 and implemented by the Commission in 1993 were designed to constrain the perceived market power of cable operators; they were not intended to, and consequently do not, regulate the programming industry per se.


⁶ Reply Comments of Viacom Inc. at 6, CS Docket 96-133 (filed Aug. 19, 1996).

⁷ See e.g., Reply Comments of Viacom Inc., CS Docket 96-133, filed Aug. 19, 1996; Reply Comments of Viacom Inc., CS Docket 95-61 (filed July 28, 1995), Comments of Viacom Inc., CS Docket 95-61 (filed June 30, 1995).

7. Conclusion. For the reasons set forth above, Viacom urges the Commission to reject DIRECTV's suggestions to consider commencing an inquiry to review the issue of expanding the program access rules.

Respectfully submitted,

Viacom Inc.

By: 
Edward Schor
1515 Broadway
New York, NY 10036

CERTIFICATE OF SERVICE

I, Katina Kalage, hereby certify that on this 17th day of July, 1997, I caused copies of the foregoing "Viacom Reply Comments" to be mailed via first-class postage prepaid mail to the following:

Jonathan D. Blake
Kurt A. Wimmer
Erin M. Egan
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-7566
Counsel for Corporate Media
Partners d/b/a *americast*

Gary M. Epstein
James H. Barker
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004
Counsel for DIRECTV, Inc.

Daniel L. Brenner
Diane B. Burstein
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
Counsel for the National Cable
Television Association, Inc.

Howard J. Symons
Michael B. Bressman
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
Counsel for Rainbow Media Holdings, Inc.

Arthur H. Harding
Seth A. Davidson
Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20554
Counsel for Time Warner Cable

Brian Conboy
Michael Hammer
Michael Finn
Willkie, Farr & Gallagher
Three LaFayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
Counsel for Home Box Office

Paul J. Sinderbrand
Robert D. Primosch
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Suite 600
Washington, D.C. 20006
Counsel for The Wireless Cable Association
International, Inc.

Lawrence R. Sidman
Jessica A. Wallace
Verner, Liipfert, Bernhard, McPherson &
Hand, Chtd.
901-15th Street, N.W.
Suite 700
Washington, D.C. 20005
Counsel for Ameritech New Media, Inc.

Gigi B. Sohn
Media Access Project
1707 L. Street, N.W.
Suite 400
Washington, D.C. 20036